Multiview Enterprise Sdn Bhd v Orientus Industry Sdn Bhd

HIGH COURT (JOHOR BAHRU) — WRIT OF SUMMONS NO 22-378 OF 1999(4)
AZAHAR MOHAMED JC
14 JULY 2005

Civil Procedure — Case management — Directions made by trial judge during pre-trial case management

Civil Procedure — Striking out — Failure to comply with order made at pre-trial case management conference — Whether proper course of action was to reinstate the writ and statement of claim or by way of an appeal

The plaintiff filed a summons in chambers (encl 39) to reinstate the writ and statement of claim which was struck out by the learned Judicial Commissioner on 12 December 2003. This striking out was done pursuant to the powers conferred by O 34 of the Rules of the High Court 1980 for non-compliance with the directions given by the learned Judicial Commissioner on 19 September 2003 at the pre-trial case management conference. The plaintiff argued that the proper mode by which the plaintiff should pursue this matter was by way of summons in chambers as in encl 39. It was also argued that the suit was struck out on a technical ground and not on its merits. Learned counsel for the plaintiff also urged the court to exercise its discretion and to invoke the inherent powers to reinstate this suit. On the other hand, the defendant placed heavy reliance on the case of *Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 481 to support the argument that the learned Judicial Commissioner had made a peremptory order on 19 September 2003 and that the suit was struck out for disobedience of that peremptory order. The defendant also submitted that the plaintiff's application in encl 39 was clearly wrong and that the plaintiff ought to have appealed to the Court of Appeal against the order of 12 December 2003. The first issue to be determined was whether the proper course of action to be taken by the plaintiff was by way of an appeal to the Court of Appeal against the order of 12 December 2003 or by an application by way of summons in chambers to reinstate the writ and statement of claim.

Held, dismissing the application:

The order of 19 September 2003 was in the nature of a peremptory order of the court and the plaintiff had failed to comply with it. The proper course of action to be taken by the plaintiff aggrieved by the order of 12 December 2003 in the circumstances of this case was by way of an appeal to the Court of Appeal and not by filing this summons in chambers to reinstate the writ of

summons and statement of claim (see para 8); *Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 481 followed.

[**Bahasa Malaysia summary**

Plaintif telah memfailkan satu saman dalam kamar (lampiran 39) untuk menghidupkan semula writ dan penyata tuntutan yang telah dibatalkan oleh Pesuruhjaya Penghakiman pada 12 Disember 2003. Pembatalan ini telah dibuat mengikut kuasa-kuasa di bawah Aturan 34 Kaedah-Kaedah Mahkamah Tinggi 1980 disebabkan ketidakpatuhan kepada arahan-arahan yang diberikan oleh Pesuruhjaya Penghakiman pada 19 September 2003 di persidangan pengurusan kes pra-bicara. Plaintif telah berhujah bahawa cara yang sesuai untuk plaintif meneruskan perkara ini adalah melalui permohonan saman dalam kamar seperti dalam lampiran 39. Plaintif juga telah berhujah bahawa tindakan ini telah dibatalkan, atas alasan teknikal dan bukannya di atas meritnya. Peguamcara plaintif juga telah mendesak mahkamah ini untuk menggunakan budi bicaranya dan menggunakan kuasa-kuasa yang sedia ada untuk menghidupkan semula tindakan ini. Pihak defendan pula telah merujuk kepada kes *Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 481 untuk menyokong hujahannya bahawa Pesuruhjaya Penghakiman tersebut telah memberikan suatu perintah muktamad pada 19 September 2003 dan bahawa tindakan tersebut telah dibatalkan kerana ketidakpatuhan kepada perintah muktamad tersebut. Defendan juga telah berhujah bahawa permohonan plaintif dalam lampiran 39 adalah salah sama sekali dan bahawa plaintif seharusnya memfailkan rayuan kepada Mahkamah Rayuan terhadap perintah bertarikh 12 Disember 2003 tersebut. Isu pertama untuk ditetapkan adalah sama ada perjalanan tindakan yang sesuai untuk diambil oleh plaintif adalah melalui rayuan kepada Mahkamah Rayuan terhadap perintah bertarikh 12 Disember 2003 atau melalui permohonan saman dalam kamar untuk menghidupkan semula writ dan penyata tuntutan tersebut.

Diputuskan, menolak permohonan tersebut:

Perintah bertarikh 19 September 2003 tersebut mempunyai sifat suatu perintah muktamad oleh mahkamah dan plaintif telah gagal untuk mematuhinya. Perjalanan tindakan yang sesuai, yang patut diambil oleh plaintif yang terkilan dengan perintah bertarikh 12 Disember 2003 di dalam hal keadaan kes ini, adalah melalui suatu rayuan kepada Mahkamah Rayuan dan bukan melalui pemfailan saman dalam kamar untuk menghidupkan writ saman dan penyata tuntutan tersebut (lihat perenggan 8); *Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 481 diikut.]

Notes

For cases on case management, see 2(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1470–1473.

For cases on striking out, see 2(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2526–2632.

Cases referred to

Chua Cheng Wan v Chua Thiam Slew & Ors [2000] 1 CLJ 433 (refd)
Lim Oh & Ors v Allen & Gledhill [2001] 3 MLJ 481 (folld)
Tan Geok Lan v La Kuan Lian Kuan [2004] 3 MLJ 465 (refd)

Legislation referred to

Rules of the High Court 1980 O 34 rr 4, 7

Camilla Anastasia (Sheam Delamore & Co) for the plaintiff.
Johanan A Phutusheary (Rashel Chacko with him) (Tea, Kelvin Kang & Co) for the defendant.

Azahar Mohamed JC:

[1] On 12 December 2003 the learned judicial commissioner struck out the plaintiff's suit pursuant to the powers conferred by O 34 of the Rules of the High Court 1980 ('the RHC') for non-compliance with the directions given by him on 19 September 2003 at the pre-trial case management conference with solicitors for the parties. For that reason, on 26 December 2003 the plaintiff took out this summons in chambers in encl 39 to reinstate its writ and statement of claim.

[2] On the appointed date of the hearing of the summons on 8 October 2004, it was agreed that I should first determine the following issue: whether the proper course of action to be taken by the plaintiff is by way of an appeal to the Court of Appeal against the order of 12 December 2003 or by an application by way of summons in chambers to reinstate the writ and statement of claim. It was the argument of learned counsel for the plaintiff that the proper mode in which the plaintiff should pursue this matter was by way of summons in chambers as in encl 39. It was also argued that the suit was struck out on a technical ground and not on its merits. Further, learned counsel urged me to exercise my discretion and invoke the inherent powers to reinstate this suit. On the other hand, learned counsel for the defendant placed heavy reliance on *Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 481 to support his argument that the learned judicial commissioner made a peremptory order on 19 September 2003 and that the suit was struck out for disobedience of that peremptory order. Hence, learned counsel for the defendant maintained that the plaintiff's application in encl 39 was clearly wrong and that the plaintiff ought to have appealed to the Court of Appeal against the order of 12 December 2003.

[3] I now turn to address the arguments that were advanced by both parties. In my view the answer to the issue that I have pointed out lies in the judgment of Steve Shim CJ (Sabah & Sarawak) in *Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 481, where His Lordship speaking for the Federal Court said at p 239:

> It is significant to note the following undisputed facts, namely, that there was an application by the appellants (as plaintiffs) to amend their writ of summons and statement of claim to include the respondent as a defendant in the first suit; that in consequence thereof the court made an order granting the said application, the effect of which would require the appellants (as plaintiffs), as a matter of course, to comply with O 20 r 9 Rules of the High Court 1980 which stipulated that the amendment was to be made within 14 days from the date of the court order, otherwise the amendment would cease to have any effect; that the appellants had failed to effect the said amendment within the stipulated period and apparently without any explanation for such failure.
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> In our view, the factual circumstances in the instant case clearly indicate that it was not a situation where there was a mere failure on the part of the appellants to comply with the rules of court because quite obviously, there was in existence a specific court order directing the appellants to effect the amendments in compliance with the Rules of the High Court. It was in the nature of a peremptory order of the court and the appellants (as plaintiffs) had failed to comply with such a peremptory order.

And further down, His Lordship said:

> Given the view which we take that there was clearly in existence a peremptory order of the court and that the learned senior assistant registrar had struck out the appellants' first suit for disobedience of that peremptory order, we agree with the Court of Appeal's conclusion that the appellants ought to have appealed against that decision and that the filing of the second suit, containing as it did, the same issues and reliefs as the first suit, amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court.

[4] In the present case, on 19 September 2003 pursuant to O 34 of the RHC, the learned judicial commissioner gave specific directions to the parties to file in certain documents on or before 12 December 2003. In this regard, I think it is important that I reproduce the relevant passage of the judgment of the learned judicial commissioner in order to appreciate the scope of the order of 12 December 2003:

> On the 12 December 2003 Mr CY Lim and Miss Rachel Chacko, learned counsel for the plaintiff and defendant respectively appeared before the court and requested the court to fix another date for case management as they have not complied with the direction given by the court on 19 September 2003.
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> The reason given by learned counsel for the plaintiff was that they were waiting for documents from their clients. When the court enquired from plaintiff's counsel as to

the date when they requested their clients for the documents plaintiff's counsel replied that they had written to the plaintiff but was unable to inform the court of the date as he did not bring the correspondence between the plaintiff's counsel and defendant's counsel in respect of the Common Bundle of Documents, Statement of Issues and the Witness Statement. Plaintiff's counsel replied in the negative.

The sequence of events aforesaid clearly shows that not only was there no plausible account and/or reasons for failure to comply with the court's directives but there was complete absence of any action on the part of the plaintiff's counsel to attempt to comply with the court's direction and tantamount to disobeying the court's directives — it shows a blatant disregard of the court's directives which warrants the court to make the order to striking out the plaintiff's claim pursuant to the powers conferred by O 34 Rules of the High Court 1980.

[5] In *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465 Mohd Noor Ahmad FCJ speaking for the Federal Court reminded us of the significance of pre-trial case management procedure under O 34 of the RHC which came into force on 22 September 2000. This is what His Lordship said about this topic at p 473:

The significance of this procedure is that it marks a change from the traditional position under which the progress of cases was left largely in the hands of the parties. Now, under the procedure the court controls the progress of cases by the exercise of its powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedures applicable during that stage are complied with promptly and not abused.

[6] Unmistakably in this case the learned judicial commissioner had made specific directions the effect of which would require the parties to comply with O 34 r 4 of the RHC. He then fixed a date for the court to ascertain compliance with its directions. On 12 December 2003 upon finding that the party had failed to comply with the directions, he struck out the suit. In this context, O 34 r 7 of the RHC reads:

If any party to an action fails to comply with any direction given by the judge at any pre-trial conference, such order may be made against the defaulting party by the judge as meets the ends of justice.

[7] Following the case of *Lim Oh & Ors v Allen & Gledhill*, to my mind the order of 19 September 2003 was in the nature of a peremptory order of the court and the plaintiff had failed to comply with it. For that reason the plaintiff ought to have appealed to Court of Appeal against the order of 12December 2003. In this regard, I would like to refer to the case of *Chua Cheng Wan v Chua Thiam Siew & Ors* [2000] 1 CLJ 433. There, the court issued a show-cause notice to the plaintiff for failing to file a summons for directions, which he had been instructed to file. On the hearing of the show-cause notice, the judge struck out the writ and statement of claim for non-prosecution. The plaintiff then filed an application by way of summons-in-chambers to reinstate

the writ and statement of claim. Abdul Wahab Patail J dismissed the plaintiffs application and he said this, and I respectfully agree with him, at p 435:

> The proper course of action to be taken by any party aggrieved by an order is by way of an appeal. It would, in my opinion, not promote he due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed. Striking out an action disposes off the case finally so far as the court hearing the matter is concerned. That order takes effect immediately and remains in effect unless it is set aside.

And, later still His Lordship said this at p 436:

> An order may be set aside ordinarily by way of an appeal. Thus where the order was made by a senior assistant registrar, the appeal is made to a judge in chambers pursuant to O 56 r 1 of the Rules of the High Court 1980. Appeal pursuant to O56 r 2, like other appeals would be to the Court of Appeal It is essential in my opinion to the due administration of our system of law that appeal is dealt with by a higher authority. Once a matter has been concluded, it is no longer before that forum. However wide the inherent jurisdiction of a court may be to vary orders which have been made, it cannot in my opinion, extend to the making of orders in litigation that has been brought regularly to an end, be it by a hearing on the merits or having been struck off. Otherwise there can be no end to litigation. It would otherwise open the doors to ceaseless re-litigation before the same court. The value of an order of court becomes questionable if the matter can be reopened at any time and the court be at liberty to make a different order.
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> It is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which is was made the court has no jurisdiction to alter it: *Re Suffield and Watts; Exp Brown* (1988) 20 QBD 693; *Re Swire; Mellor v Swire* (1985) 30 Ch D 239; *Preston Banking Co v William Allsup & Sons* [1985] 1 Ch 141; *Invanhoe Gold Corp Ltd v Symonds* [1906] 4 CLJ 642; *MacCarthy v Agard* [1933] 2 KB 417. Once a court has made an order, it exhausts its jurisdiction, unless one can point to a specific or express provision or exception in the rules that allows that court to set aside that order. Thus, for example, a judgment in default of appearance or attendance may be set aside. An order made ex pane may be reviewed. But even so it is at the instance of the party who did not attend, and had not been heard.
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> If it is said that there is inherent jurisdiction to reinstate in the circumstances of this case I should want specific authority on the point. There is no such authority and that fact weights very strongly against the existence of such jurisdiction. Inprinciple, I think it is impossible to imply such a jurisdiction. In my opinion, none of the decided cases lend support to the view that a High Court has any inherent power or jurisdiction to reinstate an action that has been struck off, except by way of an appeal.

[8] As a consequence in my judgment the proper course of action to be taken by the plaintiff aggrieved by the order of 12 December 2003 in the circumstances of this case is by way of an appeal to the Court of Appeal

against that order and not by filing this summons-in-chambers to reinstate the writ of summons and statement of claim. In the circumstances, I am of the opinion that the plaintiff's application in encl 39 must be dismissed with costs.

Plaintiff's application dismissed with costs.

Reported by Eugene Louis